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EKAJAYA (M) SDN BHD

v.

AHMAD MAHAD & ORS

B

HIGH COURT MALAYA, IPOH
LEE SWEE SENG JC
[APPEAL NO: 16-12-10-2012]
6 FEBRUARY 2014

C ***CONTRACT:*** *Contract of employment - Whether contract of service or contract for services - Whether lorry drivers working for defendant company were independent contractors or employees - Test to be applied - Whether control test or integration test or multiple test*

D ***LABOUR LAW:*** *Employment - Employees - Whether plaintiffs employee of defendant - Whether lorry drivers working for defendant company were independent contractors or employees - Test to be applied - Whether control test or integration test or multiple test*

The respondents were lorry drivers who claimed to be working for
E the appellant company. They were tasked by the company to drive lorry tankers carrying cement. They have worked, some as long as eight years, and the shortest was for two years with the company. They were accustomed to receiving SMS messages from the company with respect to work orders. However on 1 August
F 2005, they received from the company a SMS message stating that they were "to park the lorries near the company's office and to return to the office the "Shell petrol card" and keys to the lorries." They were told by the company that the price of diesel had gone up very high and customers refused to increase the
G transport rate and as such the company could not sustain the business and had to stop taking orders from customers. The respondents filed their claims with the Director General of Labour under s. 69 of the Employment Act 1955 ("EA") for their termination benefits under the Employment (Termination and Lay-
H off Benefits) Regulations 1980 ('the regulations'). At the hearing, the company contended that the workers were all independent contractors and not employees within the meaning of the EA. The company claimed that the respondents: (i) were not given paid public holidays leave, annual leave and sick leave; (ii) were not
I paid more for work on public holidays and weekly holidays; (iii)

could be required to work on public holidays and even seven days a week; (iv) did not have a weekly holiday; (v) would not be paid if they did not work; (vi) did not have fixed working hours and may work more than eight hours per day and even up to 24 hours with no extra pay for overtime; (vii) monthly pay was not fixed and was dependent on the number of trips, tonnage of cement and destination. The Assistant Director of Labour held that as the company owned the lorries, it had sufficient control over the drivers and the manner in which the task was performed by them. She also found as a matter of fact that these workers were an integral part of the business organisation of the company in fulfilling its business process. The company had also made Employees Provident Fund ('EPF') and PERKESO contributions. Hence, it was found that the respondents were employed under a 'contract of service' within the meaning of the EA. The company appealed under s. 77(1) of the EA against that decision.

Held (dismissing appeal with costs):

(1) The "control test" may not be suitable for those who are professionals and highly skilled who nevertheless may be working as an employee for a company but whose work might not be amenable to that degree of control with respect to how a piece of work is to be done. Precisely because of the personal skill and expertise of the worker, the emphasis would be more result-based rather than rule-based. Where the 'control test' is not conclusive or not relevant because of the nature of the work, the courts may have resort to what they call the 'integration test'. The 'integration test' seeks to ascertain if the worker is 'part and parcel' of the business organisation. The courts have also developed the 'multiple test' in trying to unravel the true nature of the relationship between a company and its workers. Under this test, the court or tribunal would put weightage as it were on different factors that may favour a contract of service on the one hand and a contract for services on the other hand and see where it stacks up and tilts. (para 16)

(2) The 'control test' is still very much relevant in cases of work that is mainly manual and which does not involve a high degree of sophistication as in cases involving the operation of vehicles for the transport of goods as is the case herein. The

extent of control under the 'control test' must necessarily vary depending on the type of undertaking performed by the worker. (para 43)

(3) Even applying the 'integration test', one could not run away from the fact that the lorry drivers were an integral part and an essential part of business of the company. The fact that the workers were economically dependent on the company could not be gainsaid. Though they were permitted to work for others if really there was no work assigned them from the company, yet the truth of the matter was that it did not work out that way in reality. There was enough consistent work for them to busy themselves. Moreover, it was not possible to drive for other companies unless the workers had their own lorries for it would be wrong to use the company's lorries to transport goods for other companies. (para 51)

(4) By applying the 'control test' as well as the "integration test", the workers could fairly be regarded as having been employed under a contract of service. Even if one were to apply the 'multiple test', stacking up the factors favouring and disfavouring a contract of service, the weightage on factors favouring a contract of service were more such that it tilted the balance in its favour. (para 54)

(5) The workers were employees under a contract of service. They were thus entitled to the termination benefits under the regulations. (paras 78 & 79)

Case(s) referred to:

Cassidy v. Ministry of Health [1951] 2 KB 343 ***(refd)***

Casio (Malaysia) Sdn Bhd v. Wahab Tuan Idris [2001] 2 ILR 115 IC ***(refd)***

Employees Provident Fund Board v. Bata Shoe Company (M) Ltd [1968] 1 LNS 35 FC ***(refd)***

Employees Provident Fund Board v. MS Ally & Co Ltd [1975] 1 LNS 36 FC ***(refd)***

Great Eastern Mills Bhd v. Ng Yuen Ching & Ors [1998] 3 CLJ 847 HC ***(refd)***

Hillyer v. Governors of St Bartholomew's Hospital [1909] 2 KB 820 ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(refd)***

Market Investigations Ltd v. Minister of Social Security [1969] 2 QB 173 ***(refd)***

Mohd Firdaus Abdullah v. Hup Aik Wood Products Sdn Bhd [2012] 4 ILR 355 IC ***(refd)***
Moreen v. Swinton and Pendlebury Borough Council [1965] 1 WLR 576 ***(refd)***
Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance [1968] 2 QB 497 ***(refd)***
Stevenson, Jordan and Harrison Limited v. MacDonald and Evans [1952] 1 TLR 101 ***(refd)***

Legislation referred to:
Employment Act 1955, ss. 2, 7, 10, 69, 70(c), 77(1)
Employees Provident Fund Act 1991, ss. 2, 43(2), (8)
Employees' Social Security Act 1969, ss. 2(5), 6(1), 94
Employment (Termination and Lay-off Benefits) Regulation 1980, regs. 4, 6
Industrial Relations Act 1967, s. 2

For the appellant - Chin Tzi Song; M/s Arifin & Partners
For the respondents - G Amarjit Singh Gill; M/s Darshan, Syed, Amarjit & Partners

Reported by Amutha Suppayah

JUDGMENT

Lee Swee Seng JC:

[1] The respondents, all 24 of them, were lorry drivers and in their eyes, they all worked for the appellant company who were their employer. They were tasked by the company to drive lorry tankers carrying cement. They have worked, some as long as eight years and the shortest was for two years with the company. They were accustomed to receiving SMS messages from the company with respect to work orders. However on 1 August 2005 they all received from the company a short and rather strange SMS message in their mobile phones stating that they were all "to park the lorries near the company's office and to return to the office the "Shell petrol card" and keys to the lorries." They were told by the company that the price of diesel had gone up very high and the customers refused to increase the transport rate and as such the company could not sustain the business and had to stop taking orders from the customer.

[2] They felt that they had been unfairly treated and terminated and they went to file their claims with the director general of labour on 16 August 2005 under s. 69 of the Employment Act 1955 ("EA") for their termination benefits under the Employment (Termination and Lay-off Benefits) Regulations 1980. An inquiry was held pursuant to s. 70(c) of the EA.

Problem

[3] The company at the hearing before the assistant director of labour contended that the workers were all independent contractors and not employees within the meaning of the EA. The company also argued that consistent with being independent contractors and not as employees, the workers were not given paid public holidays leave, annual leave and sick leave as provided for under the EA. Neither were they paid more for work on public holidays and weekly holidays. In other words, the workers could be required to work on public holidays and even seven days a week. They did not have a weekly holiday. It was a case of no work no pay. They did not have fixed working hours and may work more than eight hours per day and even up to 24 hours with no extra pay for overtime! If the company had no orders from its customers for the transport of cements, then there would be no work for the workers and hence no commission. Moreover their monthly pay is not fixed per month because it is dependent on the number of trips they could make with the lorries, the tonnage of cement and destination. The number of trips was in turn dependent on the orders placed by the customers of the company.

[4] The assistant director of labour held that these workers should not be faulted merely because the company wanted to flout the law. She also held that as the company owned the lorries, it had sufficient control over the drivers and the manner in which the task was performed by them. She also found as a matter of fact that these workers were an integral part of the business organisation of the company in fulfilling its business process. She further found that the company had made Employees Provident Fund ('EPF') contributions to the EPF board by deducting the employees' contribution and contributing the employer's portion and forwarding them to the EPF from the salary portion of the employees' pay. The salary slips produced as evidence also showed two portions of the payment or so-called

commission received by the workers ie, "salary" and "loading". The EPF paid was only paid on the "salary" portion apparently to avoid paying a higher contribution to EPF.

[5] Contributions were also made by the company to PERKESO under the Employees' Social Security Act 1969.

[6] The assistant director of labour concluded based on the overall evidence adduced that the workers were employed under a "contract of service" within the meaning of the EA and not as a "contract for services" or as an independent contractor. She also found as a matter of fact that there was no alternative offer of employment in Bahau as alleged by the company and that the contract of service of the workers were terminated on 1 August 2005 after the company had sent out the SMS to the workers. The fact that the workers had to forthwith return the lorries with their keys and also the Shell Petrol Card can only mean that the workers had no more work in the company.

[7] As three of the respondents did not turn up at the hearing to give evidence, the assistant director dismissed their claims. One was not entitled to claim as his service was less than a year with the company. The assistant director made an order on 2 April 2012 for payment of the termination benefits by the company to the 20 respondents to the tune of RM62,494.25 together with interest at 8% per annum from 2 May 2012 with the detailed calculation appearing at pp. 9-11 of the grounds of judgment in the supplemental record of appeal.

Prayers

[8] The company appealed to this court under s. 77(1) of the EA against the above decision of the director general of labour. The grounds of the appeal are *inter alia* that the assistant director of labour had erred in law and in fact and failed to give sufficient weight or to show sufficient judicial appreciation of the following:

(i) That there was no written contract between the appellant company and the respondents with respect to their appointment as lorry drivers and that they were appointed orally;

(ii) That the respondents were independent contractors and not employees under the Industrial Relations Act 1967;

(iii) That the respondents were not "employees" under the Employment Act 1955;

(iv) That the EA does not apply to the respondents whose average income was more than RM1,500 per month;

(v) That the assistant director of labour had erred in law and in fact in taking into consideration irrelevant facts and failing to take into consideration relevant factors in arriving at her decision and that the decision is not supported by facts that have been proved or admitted.

Principles

[9] To determine whether the EA applies in this case to the workers to enable them to claim termination benefits under the Employment (Termination and Lay-off Benefits) Regulations 1980, one must first determine whether they are "employees" within the meaning of EA. An "employee" is defined in s. 2 of the EA as follows:

> employee means any person or class of persons:
>
> (a) included in **any category in the First Schedule** to the extent specified therein; or
>
> (b) in respect of whom the Minister makes an order under subsection (3) or section 2A; (emphasis added)

[10] The First Schedule reads as follows:

> FIRST SCHEDULE [Subsection 2(1)]
>
> Employee
>
> 1. Any person, **irrespective of his occupation**, who has entered into **a contract of service with an employer** under which such person's **wages do not exceed two thousand ringgit a month**.
>
> 2. Any person who, **irrespective of the amount of wages** he earns in a month, has entered into a **contract of service with an employer** in pursuance of which:
>
> (1) he is engaged in manual labour including such labour as an artisan or apprentice:

Provided that where a person is employed by one employer partly in manual labour and partly in some other capacity such person shall not be deemed to be performing manual labour unless the time during which he is required to perform manual labour in any one wage period exceeds one-half of the total time during which he is required to work in such wage period;

(2) he is engaged in **the operation or maintenance of any mechanically propelled vehicle operated** for the **transport of** passengers or **goods or for reward or for commercial purposes**. (emphasis added)

[11] Under reg. 4 of the Employment (Termination and Lay-off Benefits) Regulation 1980, it is provided that "...an employee shall be entitled to termination benefits payment where his contract of service is terminated for any reason whatsoever..." There are exceptions which do not apply here.

[12] Assuming for a moment that the contract is a contract of service, the fact that the workers were paid wages more than RM1,500 per month (as was the applicable rate before the amendment), does not take them out of the application of the EA if the said worker is employed in the operation of any mechanically propelled vehicle operated for the transport of goods; in simple language engaged as a lorry driver. There is thus no merit on the company's argument that just because they are paid more than RM1,500 per month, they are then outside the purview of the EA. This may be regarded as a statutory extension of the protection afforded under the EA to certain categories of manual workers and those employed in the operation of lorries for the purpose of carriage of goods.

[13] What then is a contract of service? It is defined in s. 2 of the EA as follows:

contract of service means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract;

[14] As can be seen, it does not say very much with respect to helping one identify whether a contract of service has been entered into or is it a contract for services in the nature of an

independent contractor's service. Likewise the definition of an "employer" suffers from the same infirmity as being circuitously defined as follows:

> employee means any person who has entered into a **contract of service to employ** any other person as an employee and includes the agent, manager or factor of such first mentioned person, and the word? employ, with its grammatical variations and cognate expressions, shall be construed accordingly; (emphasis added)

The Test For Determining Whether There Is A Contract Of Service

[15] What is lacking in statutory definition has been made good through the development of case law decisions of the courts with respect to the *indicia* of a contract of service. It was at first easy to follow the "control test" with respect to a master controlling the servant on what is to be done and how it is to be done. Its origin may be traced back to the early 19th century in the agricultural, industrial and mechanical enterprise. The greater the element of control that the master has over the servant the more likely it is to be a contract of service rather than a contract for services. The earlier cases highlight this quite well. One such case is that of *Hillyer v. Governors of St Bartholomew's Hospital* [1909] 2 KB 820 where it was held that nurses working in the operation theatre were not employees of the hospital because they took their orders from the operating surgeon and not the hospital authorities, although they were employees of the hospital for general purposes. Some questions relevant under this test would be as follows:

(1) The employer's power of selection of the employee;

(2) Whether the employer paid wages;

(3) The employer's right to control the method of doing the work; and

(4) The employer's right to suspend or dismiss the worker.

[16] However the "control test" may not be suitable for those who are professionals and highly skilled who nevertheless may be working as an employee for a company but whose work might not be amenable to that degree of control with respect to how a piece of work is to be done. Precisely because of the personal skill and expertise of the worker, the emphasis would be more result-based rather than rule-based.

[17] Through the years, the nature of work has metamorphosed and transformed itself such that words like "control" has become a taboo word in the workplace and it is being replaced by a more liberating word "empowerment". A successful entrepreneur of a global IT company was credited to have said that there are only three conditions you need to meet to work for his company:

(1) When I set target it must be met;

(2) When I ask a question you must have the answer and

(3) When I call for a meeting you must be there.

[18] You can even work from anywhere in the world and he is certainly not impressed with those who clock in early and clock out late!

[19] With the advent of IT, the promotion of flexi hours of work, the advancement in teleconference facilities and the trend towards encouraging entrepreneurship and keeping the corporation lean and thin, companies are exploring a myriad of business and working relationships between a so-called employer and its workers. The buzzword these days is "outsourcing" such that a company need only to focus on its core business and anything non-core is being outsourced to another company which can do it better and cheaper. As the business environment becomes less predictable, companies begin to explore a myriad of hybrid business and employment relationship with its so-called workers or key players or partners in the loose sense of the word. No longer is a fix monthly pay attractive to keep an employee and some incentives are added based on performance and in some cases even the element of profit sharing.

[20] In *Employees Provident Fund Board v. Bata Shoe Company (M) Ltd* [1968] 1 LNS 35; [1968] 1 MLJ 236, the Court of Appeal upheld the decision of the High Court that shop managers were employees of Bata due to the considerable control which the company had over the shop managers. However there was no relationship of employer and employee between the Bata Shoe Co. (M) Ltd and the salesmen employed by the shop managers of the company. Under the agreement between the company and the managers, the managers were given power to employ persons to assist them and it was stated that the managers would be responsible for payments under the then Employment Provident Fund Ordinance 1951.

[21] Where the 'control test' is not conclusive or not relevant because of the nature of the work, which may frequently be the case (eg. *Cassidy v. Ministry of Health* [1951] 2 KB 343 and *Moreen v. Swinton and Pendlebury Borough Council* [1965] 1 WLR 576), the courts may have resort to what they call the 'integration test'.

[22] The 'integration test' seeks to ascertain if the worker is 'part and parcel' of the business organisation. Each case will have to be studied based on its own peculiar setup.

[23] In *Stevenson, Jordan and Harrison Limited v. MacDonald and Evans* [1952] 1 TLR 101, a case on copyright, Denning LJ said that:

> [This case] raises the troublesome question of the distinction between a contract of service and a contract for services. The test usually applied is whether the employer has the right to control the manner of doing the work ...
>
> It is often easy to recognise a contract of service when you see it, but difficult to say wherein the distinction lies... One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

[24] Lord Denning gave the illustrative comparison between the captain of a ship (an employee of the shipowners) and the pilot who boards the ship only to take it safely into harbour (an essential service but not one which makes the pilot an integral part of the shipowners' business).

[25] In other words the test looks at the integration of the worker into the employer's business and asks: "is that worker economically dependent on the company?" or "are the worker's activities an essential component of the business?"

[26] The test was employed by Wan Suleiman FJ in *Employees Provident Fund Board v. MS Ally & Co Ltd* [1975] 1 LNS 36; [1975] 2 MLJ 89. In this case, the Federal Court found that working assistants who conducted and managed the business of MS Ally & Co Ltd and were rewarded by a share of the profits were employees of MS Ally as, *inter alia*, there was a sufficiency of control over the working assistants.

[27] The facts are succinctly summarised in the headnotes as follows at p. 89: A

> The respondent company was a private company dealing in provisions, medical supplies and general merchandise. The business of the respondent company was conducted and managed by a group of persons known as working assistants who were rewarded by a share of the profits. All capital required by the business was provided by the company and all labour and skill in the conduct and management of the business were supplied by the working assistants. The two issues that were raised in this case were (1) whether the working assistants were employees within the meaning of the Employees Provident Fund Ordinance 1951, that is whether they were persons employed under a contract of service to work for an employer; and (2) whether even if the working assistants were employees within the meaning of the Ordinance, contributions were payable by them towards the Employees Provident Fund. B C D
>
> The learned trial judge held that the working assistants were not employed under a contract of service and he also held that no contributions were payable by them. The appellant appealed to the Federal Court. E

[28] At p. 90 of the headnotes it was held as follows:

> Held:
>
> (1) the correct conclusion to be drawn from the evidence was that there was a sufficiency of control or that the working assistants were part and parcel of the organization; that **they were employed as part of the business and their work was done as an integral part of and not as an accessory to the business**. The working assistants were therefore under a contract of service and not a contract for service and they were employees within the meaning of the Employees Provident Fund Ordinance, 1951; F G
>
> (2) what the working assistants receive each year were not wages as defined in the Employees Provident Fund Ordinance, 1951 and therefore contributions were not payable by them to the Employees Provident Fund. (emphasis added) H

[29] The creativity of companies in exploring a myriad of hybrid relationships in its quest to tap into the entrepreneur spirit of its workers and harnessing it for its benefit and at the same time not wanting to be saddled with the trappings that come with a traditional contract of service commitments of an employer, have led the courts to develop the "multiple test" in trying to unravel I

the true nature of the relationship between a company and its workers. Under this test, the court or tribunal would put weightage as it were on different factors that may favour a contract of service on the one hand and a contract for services on the other hand and see where it stacks up and tilts.

[30] This can be seen in the case of *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1968] 2 QB 497 where the facts are summarised as follows:

> *Ready Mixed Concrete (South East) Ltd* ("RMC") was in the business of making and selling ready mixed concrete. The company had engaged an independent haulage contractor to deliver the concrete to customers but that contract was terminated and RMC decided to introduce a scheme whereby concrete was delivered by owner-drivers working under written contracts.
>
> The owner-drivers entered into a hire purchase agreement with Ready Mix Finance Ltd to purchase a lorry but the mixing equipment on the lorry was the company's property. They could employ suitably qualified drivers to drive the lorry in their place and even pay substitutes to take their place. They have to wear the company's uniform. They must carry out all reasonable orders from any servants of the company. They must maintain lorry at their own expense and pay running costs.
>
> In 1965 the company asked the Minister of Social Security for a determination of the employment status of one of the owner-drivers, Mr Latimer.

[31] The Minister decided that Mr Latimer was employed under a contract of service but, on appeal to the High Court, MacKenna J held that he was running a business of his own. In summing up MacKenna J said that Mr Latimer was a "small business man" and not a servant. He concluded that the contract was not one of service but of carriage.

[32] It has become a most widely-used test seeing the creativity of companies to on the one hand wanting its workers to have a "stake" in the business and at the same time preserving that loose relationship that can be terminated at anytime by either party without the need to assign any reason. The "control test" has more or less given way to a more careful analysis of the circumstances of the working relationship as can be seen in the "multiple test." The "control test" is no longer determinative of the issue and is more likely to be used in conjunction with other tests.

[33] The central elements of the "multiple test" are:

> Did the worker undertake to provide his/her own work and skill in return for remuneration?
>
> Was there a sufficient degree of control to enable the worker fairly to be called a servant? The first of the tests to evolve was called the control test. The basic question was whether the employer told the worker what job to do, when it was to be done and how it was to be done. (cf. *Whittaker v. Ministry of Pensions* [1967] 1 QB 156)
>
> Were there any factors inconsistent with the existence of a contract of service which would definitely negate the existence of a master/servant relationship. If there are not, then there is a presumption that, because the worker could be a servant, he should be so considered.

[34] The test was applied in *Casio (Malaysia) Sdn Bhd v. Wahab Tuan Idris* [2001] 2 ILR 115.

[35] There are also cases where because of the circumstances and complexities in the working relationship, the true nature of the contract may be better ascertained under the "entrepreneur test" or "economic reality test" by considering the question of "whose business is it" by examining the following factors:

(1) Control (as in the "control test");

(2) Ownership of tools;

(3) Does the individual have a chance of profit;

(4) Who bears the risk of loss?

[36] This test can be traced to the case of *Market Investigations Ltd v. Minister of Social Security* [1969] 2 QB 173 at pp. 184-185:

> The fundamental test to be applied is this: '*Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services*. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that **control will no doubt always have to be**

A **considered, although it can no longer be regarded as the sole determining factor**; and that factors which may be of importance are such matters as *whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task*. (emphasis added)

[37] The *dicta* of Cooke J. at pp. 186-188 which would be of relevance to our consideration is set out as follows:

C It is apparent that the control which the company had the right to exercise in this case was very extensive indeed. It was in my view so extensive as to be entirely consistent with Mrs. Irving's being employed under a contract of service. **The fact that Mrs. Irving had a limited discretion as to when she should do the** D **work was not in my view inconsistent with the existence of a contract of service**. For examples of a servant having such a discretion, see *Hobbs v. Royal Arsenal Co-operative Society Ltd.* (1930) 23 B.W.C.C. 254, C.A., and *Amalgamated Engineering Union v. Minister of Pensions and National Insurance* [1963] 1 E W.L.R. 441. **Nor is there anything inconsistent with the existence of a contract of service in the fact that Mrs. Irving was free to work for others during the relevant period**. It is by no means a necessary incident of a contract of service that the servant is prohibited from serving any other employer. Again, there is nothing inconsistent with the existence of a contract of F service in the master having no right to alter the place or area within which the servant has agreed to work. So far as concerns practical limitations on a master's power to give instructions to his servant, there must be many cases when such practical limitations exist. For example, a chauffeur in the service of a car hire G company may, in the absence of radio communication, be out of reach of instructions for long periods.

I therefore turn to the second question, which is whether, when the contract is looked at as a whole, its nature and provisions are consistent or inconsistent with its being a contract of service.

H Mr. Pain, for the company, points first to the fact that Mrs. Irving was appointed on each occasion to do a specific task at a fixed fee. He points to the fact that the company's officers were of the opinion that they could not have dismissed Mrs. Irving in the middle of an assignment. He says that these factors are more I consistent with the conception of a contract for services than a contract of service.

As to the first factor, **appointment to do a specific task at a fixed fee, I do not think that this is inconsistent with the contract being a contract of service**. See, for example, *Sadler v. Henlock* (1855) 4 E. & B. 570.

As to the right of dismissal, it is necessary to distinguish between a right of dismissal for breach and a right of dismissal irrespective of breach.

It is noticeable that as regards the right of dismissal for breach, the Minister's finding is somewhat cautiously worded; it relates to what the company's officers thought and not to what the provisions of the contract were. In the absence of some special term either expressed in the contract or to be implied from particular circumstances, I should have thought that certain types of breach might well justify dismissal of an interviewer, even in the middle of an assignment. I cannot see on what ground the right to dismiss in the middle of an assignment is said to be entirely excluded in this case; but assuming that it is, that fact does not in my view assist the company in establishing that the contract is a contract for services and not a contract of service. *Even in a contract for services a breach by one party which goes to the root of the contract will entitle the other party to terminate it. In this respect, there is no difference between a contract for services and a contract of service, except that in the latter case the master's right is spoken of as a right of dismissal - a peculiarity of words which makes no difference to the substance*.

So far as concerns dismissal irrespective of breach, it is of course clear that the interviewer in this case could not, in the absence of a breach, be dismissed in the middle of an assignment. But there is nothing in this which is inconsistent with the contract being a contract of service. **It is quite common for contracts of service to be entered into for fixed periods with no provision, express or implied, for dismissal during the specified period**.

Then Mr. Pain says that the fact that the contract makes no provision for time off, sick pay and holidays, suggests that it is not a contract of service. I cannot accept that this is a test which is of great assistance in the present case. **The fact that the contract makes no provision for time off is merely a reflection of the fact that there are no specified hours of work**. I have already dealt with this. The fact that there is no provision for sick pay and holidays is merely a reflection of the fact that the contract is of very short duration. If a man engages himself as an extra kitchen hand at a hotel for a week in the holiday season, there will be no provision for sick pay and holidays, but the contract will almost certainly be a contract of service.

A The company then refer to the fact that Mrs. Irving's work was performed under a series of contracts, each for a specific survey. They say that the relationship of master and servant is normally conceived of as a continuous relationship, and that the fact that there is a series of contracts is more consistent with those contracts being contracts for services than contracts of service.
B For my part, I doubt whether this factor can usefully be considered in isolation. It must I think be considered in connection with the more general question **whether Mrs. Irving could be said to be in business on her own account as an interviewer**. In considering this more general question I take into account the
C fact that Mrs. Irving was free to work as an interviewer for others, though I think it is right to say that in this case there is no finding that she did so. I also take into account the fact that in her work as an interviewer Mrs. Irving would, within the limits imposed by her instructions, deploy a skill and personality which would be entirely her own. I can only say that in the
D circumstances of this case these factors are not in my view sufficient to lead to the conclusion that Mrs. Irving was in business on her own account. The opportunity to deploy individual skill and personality is frequently present in what is undoubtedly a contract of service. I have already said that *the right to work for*
E *others is not inconsistent with the existence of a contract of service. Mrs. Irving did not provide her own tools or risk her own capital, nor did her opportunity of profit depend in any significant degree on the way she managed her work*.

F Taking all the factors into account and giving full weight, I hope, to Mr. Pain's persuasive arguments, I am clearly of opinion that on the facts of this case the Minister was right in concluding that **Mrs. Irving was employed by the company under a series of contracts of service**, and the appeal accordingly must fail. (emphasis added)

G

Whether The Workers Were Engaged Under A Contract Of Service Under The Various Tests

[38] The evidence of all the 20 workers who gave evidence was that they had signed an agreement in English with the company
H before starting work but were not given a copy. They were all interviewed first by the company before they were accepted as drivers. They recalled that if any one party wants to terminate the service, a month's notice should be given. They were each assigned a lorry owned by the company.

I

They further testified that the lorries became their responsibility but that the company was responsible for its repair and maintenance. The diesel for the lorries was paid by the company. They would receive information on when to deliver the goods and they would have to follow the instructions. They said they could be asked to work on weekly holidays and public holidays as well with no additional payment. They said that on 1 August 2005 they received an SMS from the office instructing them to return to office and park the lorry and to hand over the lorry keys. They were also to remove their personal belongings from the lorries.

[39] When they arrived at the office, they enquired and one Encik Hamdan, who worked in the office, told them that the company was closing down as the diesel price had increased. Encik Hamdan also told them to find a new job. Then there was a Mr Ah Boon who, according to the workers, also said the same thing. All the workers said they did not receive any notice to stop work. Some of the workers came back after a few days but they were told by the company that there was no work for them and that the company was closing down.

[40] The company's version as narrated by its director, Mr Chuah Seong Boon, was that there was no written agreement signed. The assistant director of labour hearing the case did not quite believe the company. She has given her reason that for such an important task as carrying cement from one place to another for the company and with it the driving of the lorry owned by the company and the issues of rates, the number of trips, the case of work during weekends and public holidays are all important terms that would in all probabilities have been incorporated into a written agreement signed before the workers started work. I am inclined to agree with the finding of the assistant director of labour here.

[41] Mr Chuah in testifying for the company also stressed the following:

(1) The drivers have no basic salary and their income was not fixed,

(2) They have no fixed working hours,

(3) They have no overtime allowance,

(4) They can work up to seven days a week and also on public holidays,

(5) They do not have annual leave and if they do not want to drive they have no income,

(6) They decide on their meal and rest time when they are out driving.

[42] The "control test" is still very much relevant in cases of work that is mainly manual and which does not involve a high degree of sophistication as in cases involving the operation of vehicles for the transport of goods as is the case herein. Little wonder that parliament in its wisdom in para. 2 of the First Schedule to the EA had enacted that for such a category of workers, the fact that they are paid more than RM2,000 per month now (or RM1,500 as was then) does not take them out of the operation of the EA unless of course they can be said to be engaged under a contract for services as independent contractors. Therein is the acknowledgement of the fact that such workers are more exposed to being exploited by the exigencies and extremities that may be endemic in such an enterprise as providing labour for transport for a company who may want to insulate itself from any drop in the volume of its business from its customers.

[43] This court takes cognisance of the fact that the EA is a social piece of legislation seeking to guarantee minimum terms and conditions in the labour market for such a category of workers who may have little negotiation power because of their lack of sophisticated skills. Where the EA applies an employer cannot seek to contract out of it as any terms less favourable than the minimum terms prescribed shall be void and of no effect as provided in s. 7 of the EA. It would not be unfair to say that there is a general default to treat contracts of employment or engagement in such a category as a contract of service. A court of law would naturally scrutinise more carefully and closely any attempt to dress-up a contract of service as a contract for services and more so when the company, as here, contends that there is no written agreement signed for such an undertaking with the workers.

[44] The extent of control under the "control test" must necessarily vary depending on the type of undertaking performed by the worker. Here the company is trying to place a high

premium on the fact that there are no fixed hours of work and that they may work seven days a week and even on public holidays. There are also no extra commission paid for work on Sundays and public holidays. There was also no instructions on what routes to take and when to take rest and meal breaks. There was no sick leave and no medical benefits. It can also be discerned that in effect what the company was trying to paint and portray was that if the workers chose not to come to work when required to, all that he would lose out would be the commission for the day he decided not to work. To begin with one must not be too impressed by such terms which are generally at variance with the EA for any company seeking to structure its contract away from a contract of service and towards a contract for services would endeavour its level best to have no traces of such terms at all.

[45] It does not take much imagination to visualise that if there are no orders placed, there is no necessity of hanging around the office. It was not a case where as a driver they could double-up to do other works in the office. There was no need to specify which route to take as, after a while by comparing notes with one another, they each would know the best route to take from one point to another depending on the hours they have to make the journey. Furthermore if they should decide to take a longer route or to drive more leisurely, they would end up making fewer trips for the day. Likewise should they decide to take longer breaks and meal time, then the natural consequence would follow. This is a case where the job itself permits a degree of flexibility with respect to how it is done because the company cannot be monitoring the driver every step of the journey taken other than weeding out those who drive dangerously or too leisurely or those who went on a frolic of their own such that the full load transported is not the full load delivered.

[46] However that is not to say that there is no control exercised by the company over the workers. It is perhaps more subtle as the nature of the job is such that the worker here has a stake in wanting to make more trips per day and are only too eager to be on a standby to make more trips be it on Sundays or otherwise. The compulsory rest on days when there are no orders placed by customers would more than compensate for their having to work sometimes even more than eight hours a day and even on Sundays and public holidays.

[47] It need not be asked what would happen if the workers are in a habit of not turning up with the lorries when instructed to. They themselves testified that their pay would be withheld. They would easily get the boot with a month's notice as is the term that the workers recalled in the agreement they had signed but which copy was not given to them. Likewise if they should perform below par as in only being able to make a trip per day because of long rest or meal breaks. There is little difference between the right to terminate a contract for breach or without the need to assign any reason other than giving a notice as compared with the right of dismissal as both involved a termination of the contract.

[48] They would have to follow instructions on where to go for the transport of the cement and at what time and the number of trips they have to make. They would have to follow instructions on the documentations to be completed at point of collection and delivery. They were to be responsible for the lorries assigned them and indeed they had to pay a deposit of RM3,000 to the company as deposit for the lorries and then the company would deduct a sum of RM500 from their pay every month for six months! As can be seen the nature of the job of lorry driving does not require so much control as to how the lorry is being driven but more on when to drive, where to drive, what to do at point of pick-up of the cement and delivery and the efficiency of the trips.

[49] It was submitted by the company that there was hardly any interaction between the company and the workers as instructions in the pick-up and delivery was effected through SMS sent to the workers' handphone. Of course there is no real need to meet face-to-face for a job of this nature as what is important is the quick-response time from receiving an SMS to arriving at the site of pick-up and then to delivery-site. In fact it is the kind of job that makes little sense requiring punch-in and punch-out as the paradigm is more of being on a ready stand-by always so as to respond quickly to any instructions from the company via SMS message.

[50] Even if one were to apply the "integration test", one cannot run away from the fact that the lorry drivers were an integral part and indeed an essential part of business of the company. The fact that the workers were economically dependent on the company cannot be gainsaid. Though they are permitted to work for others

if really there was no work assigned them from the company, yet the truth of the matter was that it did not work out that way in reality. There was enough consistent work for them to busy themselves. Moreover it was not possible to drive for other companies unless the workers have their own lorries for it would be wrong to use the company's lorries to transport goods for other companies.

[51] There was also the element of long standing work relationship and stability both in terms of years of service stretching to eight years in some cases with predictably consistent monthly income for the workers though it does vary from month to month. The fact that a worker is paid based on a fixed fee, rate, commission or piece-rated is not inconsistent with a contract of service.

[52] The transport of cement for its customers was in fact the company's core business such that once the price of diesel went skyrocketing and the customer was not prepared to increase its rental rate, the company had to terminate the workers concerned. No one is faulting the company for having to do so in the light of what was then deemed as no longer a profitable business. All the workers were asking was for their termination benefits. This is not a case where the workers were claiming for reinstatement on ground of having been terminated without just cause or excuse or compensation *in lieu* thereof.

[53] I would hold that by applying the "control test" as well as the "integration test", the workers can fairly be regarded as having been employed under a contract of service.

[54] Even if one were to apply the "multiple test" one would stack up the following as factors in favour of a contract of service:

(1) Payment of salaries.

(2) Payment of EPF and SOCSO by the company contributing its portion.

(3) Control over the instruction to respond to orders placed by customers and where to deliver the cement.

(4) Length of work stretching into eight years for some with quite consistent monthly pay.

[55] The factors tending towards a contract for services are:

(1) No fixed hours of work.

(2) No extra payment for work on holidays.

(3) No annual leave or sick leave.

(4) Company not obliged to provide work.

[56] Stacking up the factors favouring and disfavouring a contract of service, I would say the weightage on factors favouring a contract of service are more such that it tilts the balance in its favour.

[57] It may well be asked if the workers are small businessmen in their own right, running for profit a transport of cement business. That is essentially what the "entrepreneur test" would ask. The tools in the lorries are that of the company. The fact that they must take proper care of it is reflected in the RM3,000 deposit that the workers each have to pay. Whilst it is true that their pay were not exactly the same every month, there were consistent enough for all of them depending on the number of trips they could make. However there was no way for them to so organise themselves so that they could reduce costs, optimise profits, engage staff or delegate to others to work for them, lobby for more contracts with customers, increase customer-base, own or lease the lorries depending on demand and the like. This is not a case where they could so manage their work or work a plan for more profits. They could not delegate the work to some other persons or hire someone to drive the lorry for them. They certainly could not use the company's lorry to do work for others even if there was no work for them. As a concession they were allowed to work for others but that was more to buffer the harshness of having no work to do in case of no orders from customers. The fact that they could work for others and there was no evidence that they did that, was in any event, not inconsistent with a contract of service.

[58] What was required of them and what they did provide was their labour on a standby to drive the lorry from collection point to delivery point. In short it was not a case where they had the opportunity to make profits which would be the case if they are running a business like an independent contractor.

[59] There is correspondingly no risk of loss that the workers need to worry because there is no costs incurred or capital involved other than their time not being utilised to exchange their labour for cash. Whilst they could not make a profit, the company on the other hand could optimise profit and minimise loss. The company's costs is fixed based on the costs per trip they have to pay the workers and when there is no order placed, there is no risk of loss because no trips, no payments out! In such a structure where the workers have more to lose than to gain, the court would require strong evidence that the contract is not a contract of service especially when it has been in subsistence with some element of stability for some two until eight years. Taken overall and seeing their lack of any negotiating powers, I would conclude even based on the "entrepreneur test" that they are not independent contractors doing a small business but employees under a contract of service but without getting the protection and benefits under the EA.

Whether The Contribution Of Epf And Socso By Both The Workers And The Company Is Consistent With A Contract Of Service

[60] More than just the "control test" and the other tests referred to above, what is equally if not more important is the payments made to the workers each month based on the number of trips that they could make. In all the monthly payment report or salary slip of each driver produced by the company at pp. 14-159 of the record of appeal, there was a column called "salary" in which the salary per month of that worker was stated. There was another column called "loading" and as can be seen in the calculation, what a worker take home would be his "salary" plus "loading" after deducting his EPF and SOCSO contribution. The designation "basic salary", "employee portion" and "employer portion" for both EPF and SOCSO contributions of the company appear in the monthly drivers' payroll sheet kept by the company and tendered as evidence and appearing at pp. 161-173 of the record of appeal.

[61] The fact that "salary" was paid every month is a very strong *indicium* of a contract of service as in an employment contract. The company had no doubt that it was salary or wages that attracts EPF contribution from both the company and the workers. It is a device to pay less EPF by the company as there

is no good reason and no reasonable explanation has been given by the company as to why there should be another portion of the workers' take-home remuneration called "loading".

[62] Section 2 of the Employees Provident Fund Act 1991 ('EPF Act') defines an "employee" as:

> "employee" means any person, not being a person of the descriptions specified in the First Schedule, who is employed **under a contract of service** or apprenticeship, whether written or oral and whether expressed or implied, to work for an employer; (emphasis added)

[63] Section 2 also defines "wages":

> "wages" means all **remuneration in money, due to an employee under his contract of service** or apprenticeship whether agreed to be paid monthly, weekly, daily or otherwise and **includes any** bonus, commission or allowance payable by the employer to the employee whether such bonus, commission or allowance is payable under his contract of service, apprenticeship or otherwise, but does not include:
>
> (a) service charge;
>
> (b) overtime payment;
>
> (c) gratuity;
>
> (d) retirement benefit;
>
> (e) retrenchment, lay-off or termination benefits;
>
> (f) any travelling allowance or the value of any travelling concession; or
>
> (g) any other remuneration or payment as may be exempted by the Minister. (emphasis added)

[64] Section 43 of the EPF Act speaks of the rate of contribution based on "wages" as follows:

> Rate of contributions
>
> 43. (1) Subject to section 52, every employee and every employer of a person who is an employee within the meaning of this Act shall be liable to pay monthly contributions on the amount of wages for the month at the rate respectively set out in the Third Schedule.

[65] It is clear that "wages" include commission paid out to employees under a contract of service. The rationale is obvious, it being a social piece of legislation. There are companies that may want to pay a lower wage or salary and a higher commission to its workers so that it may not have to pay so much EPF on a higher take-home if the distinction and separation was not done. To the company their commitment is at most a lower basic wage and the balance based on commission is paid based on performance. It is the employees that will lose out at the end of the day in terms of a higher savings for old age. What is more disturbing here is that the "loading" or "commission" is always almost the same as the "salary"! The irresistible inference is that the company at the end of the day would calculate how much is the remuneration and then divide it into two equal portions calling one "salary" and another "loading" and pay EPF just on the salary portion.

[66] It does not matter that the salaries per month vary for each driver based on the number of trips he could make. It does not even matter that there is a basis for calculating their salaries based on 15-16% of the rental of the lorry that each of the driver drove as the first respondent seemed to have understood from the complaint he made on behalf of himself and 23 others to the director general of labour. In the final analysis it was still salaries paid to the workers that attracted an EPF and SOCSO deduction from the employee and an EPF and SOCSO contribution from the employer.

[67] By no means am I suggesting that a self-employed person cannot pay EPF. There are exceptions in s. 43(8) of the EPF Act but these are exceptions by for instance those who are self-employed. Section 43(8) reads as follows:

> (8) Notwithstanding subsection (1):
>
> (a) a **self-employed person**;
>
> (b) a pensionable employee;
>
> (c) any person not being an employer or an employee within the meaning of this Act; or
>
> (d) any person not being an employer and not being an employee within the meaning of this Act and both have given their consent to contribute,

A may, by giving notice in such manner as may be prescribed by the Board, elect to pay monthly contributions in accordance with the rate as prescribed by the Board. (emphasis added)

[68] The company's explanation was that even though it was not obliged to contribute EPF yet it did so to help the workers. If that be so, it should be helping by contributing EPF on both the "salary" and the "loading". It stands to reason that they did what they did because they were aware of the sanction of not paying EPF in a case where under a contract of service, EPF is payable. Section 43(2) provides for the criminal penalty as follows:

> Any person being an employer who **fails**, within such period as may be prescribed by the Board, **to pay to the Fund any contributions which he is liable under this Act** to pay in respect of or on behalf of any employee in respect of any month shall be guilty of an offence and shall, on conviction, be **liable to imprisonment for a term not exceeding three years or to a fine not exceeding ten thousand ringgit or to both**. (emphasis added)

[69] The case of *Great Eastern Mills Bhd v. Ng Yuen Ching & Ors* [1998] 3 CLJ 847 is extremely relevant as the facts there involving lorry drivers are rather similar to the present case. Though the dicta of the court was in the context of the meaning of "workman" under the Industrial Relations Act 1967 ('IRA'), yet the definition of "workman" covers those who work under a contract of employment. Section 2 of the IRA defines "workman" as follows:

> "workman" means any person, including an apprentice, **employed by an employer under a contract of employment to work for hire or reward** and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute. (emphasis added)

[70] In *Great Eastern Mills Bhd v. Ng Yuen Ching & Ors* [1998] 3 CLJ 847 at pp. 851-852, Nik Hashim J (as His Lordship then was) observed as follows:

> The second ground is whether the **respondents were 'workmen'** under the Act. The **determination whether a particular claimant is a workman under the Act is a mixed question of fact and law** and it is for the Industrial Court to determine this

question (see *Dr A Dutt v. Assunta Hospital* [1981] 1 LNS 5; [1981] 1 MLJ 304). A contract of service under the Act need not be in writing. It can be implied (see s. 2). Technicalities and legal forms have no place in industrial adjudication (see s. 30(5). A liberal and not a restricted or rigid interpretation is to be adopted and applied in determining whether the respondents were workmen and whether there were contracts of service between the company and the respondents (see *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687; [1995] 3 MLJ 369). In the circumstances of this case, there are ample evidence both oral and documentary (see letter at p. 172 of record) before the Industrial Court to support that the respondents were workmen under the Act. *They were the lorry drivers for the applicant and some of them were in the service of the applicant for more than 20 years. They were paid remuneration or commission according to the trips they made. Lorries with fuel were provided and maintained by the applicant. The respondents were insured by the applicant against personal accident. Even though there are no written contracts between the applicant and the respondents, these undisputed facts are nevertheless sufficient evidence to imply that there were contracts of service between them. The fact that EPF and SOCSO contributions were not made by the applicant does not prevent the respondents from becoming workmen under the Act as their non-payment is not conclusive that they were not workmen* (see *Kuala Lumpur Mutual Fund Berhad v. J. Bastian Leo & Anor* [1988] 2 CLJ 175; [1988] 2 MLJ 526 SC). Similarly, the applicant's contention that the respondents had engaged attendants and paid them which suggest that the respondents' contract with the applicant was a contract for service, is also not conclusive. **Employing attendants by the respondents, does not necessarily constitute the respondents independent contractors** (see *Bata Shoe Co (M) Ltd v. Employees Provident Fund Board* [1966] 1 LNS 18; [1967] 1 MLJ 120). **Thus, in the circumstances, the Industrial Court's finding that the respondents were workmen is justified on facts and therefore correct in law**. (emphasis added)

[71] Likewise the payment of SOCSO is mandatory for a worker engaged under a contract of service unless his wages exceed RM3,000 per month. Section 2(5) of the Employees' Social Security Act 1969 defines an "employee" as follows:

(5) "employee" means any person who is employed for wages **under a contract of service** or apprenticeship with an employer, whether the contract is expressed or implied or is oral or in writing, on or in connection with the work of an industry to which this Act applies ... (emphasis added)

[72] With respect to contribution it is provided as follows in s. 6(1) as follows:

> (1) The contribution payable under this Act in respect of an employee shall comprise contribution payable by the employer (hereinafter referred to as the employer's contribution) and contribution payable by the employee (hereinafter referred to as the employee's contribution) and shall be paid to the Organization.

[73] Likewise there is criminal penalty for non-compliance under s. 94 of the Employees' Social Security Act 1969.

[74] As the workers are lorry drivers and in that respect amenable to a greater control by the company with respect to when to drive, where to drive, how many trips to make, how the lorries are to be driven and the like, one can to a great extent apply the control test and come to the conclusion, as did the assistant director of labour, that these workers are under a contract of service. The fact that the company wanted the assistant director to believe that there was no written contract, does not derogate from the fact that all the *indicia* of a contract of service are very much present and the lack of a written contract of employment, if it were true, would mean that the company had not complied with the EA where a written contract of employment is mandatory under s. 10 of the EA.

[75] In this respect the dicta in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687 at p. 712 is relevant:

> In all cases where it becomes necessary to determine whether a contract is one of service or for services, **the degree of control which an employer exercises over a claimant is an important factor, although it may not be the sole criterion**. The terms of the contract between the parties must, therefore, first be ascertained. **Where this is in writing, the task is to interpret its terms in order to determine the nature of the latter's duties and functions. Where it is not then its terms must be established and construed**. But in the vast majority of cases there are facts which go to show the nature, degree and extent of control. These include, but are not confined to, the conduct of the parties at all relevant times. Their determination is a question of fact. When all the features of the engagement have been identified, it becomes necessary to determine whether the contract falls into one category or the other, that is to say, whether it is a contract of service or a contract for services.

There is not a single satisfactory test that is available for the determination of the issue. However, most academics are in agreement that the well-known pronouncements of Lord Thankerton in *Short v. J & W Henderson Ltd* [1946] TLR 427; of Denning LJ in *Stevenson, Jordan & Harrison Ltd v. Macdonald* [1952] 1 TLR 101; and of MacKenna J in *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497; [1968] 2 WLR 775 come fairly close to the point. We approve the approach taken by Eusoff Chin J (now Chief Justice) in *Syarikat 3M Malaysia Sdn Bhd v. Nik Kamaruddin bin Ismail* [1990] 1 MLJ 365, where he said (at p. 366):

> I am inclined to think that the Industrial Court was not concerned with nomenclature or position held by the claimant, **but was concerned to get the truth of the claimant's duties and functions in the company**. In this case in order to determine whether the claimant was or was not a workman, the Industrial Court had heard oral evidence, and perused documents submitted to it, and came to the conclusion that from the duties and functions performed by the claimant, he could not be said to be the mind and brain of the company. (emphasis added)

[76] Learned counsel for the company submitted that the payment of SOCSO is not conclusive and referred to the case of *Mohd Firdaus Abdullah v. Hup Aik Wood Products Sdn Bhd* [2012] 4 ILR 355 where it was observed as follows:

> [17] In the case before us, it is not disputed that the company did pay SOCSO contributions from 2002 to 2005 under the present company's name (p. 4 of CLB1). **However, this court after looking at the whole evidence finds that it cannot be assumed that such employer-employee relationship exists by the mere fact that there is contribution towards SOCSO**. This is because the court believes the evidence of COW1 that the company paid SOCSO contributions on advice of the SOCSO officers and **secondly, as added security for the claimant taking into account the nature of job handled by the claimant**. (emphasis added)

[77] While in that case the Industrial Court appeared to be influenced by the fact that the company had paid SOCSO based on the advice of SOCSO officer, here in the present case, no such evidence was led. At any rate I would say it is a strong *indicium* in favour of a contract of service and coupled with EPF

A contribution and the segregation of payments into two equal portions of salary and loading together with the degree of control that the company had over the workers, I would conclude that the workers are employees under a contract of service.

B **[78]** They are thus entitled to the termination benefits under the Employment (Termination and Lay-off Benefits) Regulations 1980. There was no argument raised that the calculations therein had not been correct or not in accordance with reg. 6 of the said Regulations. The argument had all along been that they are not C entitled to it at all because they were independent contractors engaged under a contract for services.

Pronouncement

[79] Having considered all the factors referred to above, this is D not a case where the assistant director of labour had misdirected herself or one where she had failed to judicially appreciate the evidence before her. I see no good reason to disturb both the finding of fact and law. Looking at the overall evidence, the contract of the workers with the company was consistent with E that of a contract of service.

[80] The appellant/company's appeal was dismissed with costs of RM5,000.

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